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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1158.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY

and

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION

and

THOMAS J. MAGRANN

and

STEPHEN J. TRAITZ,

Petitioners,

v.

ALTEMOSE CONSTRUCTION CO.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, Eastern District.

RESPONDENT'S BRIEF IN OPPOSITION.

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QUESTION PRESENTED.

For the reasons set forth in the argument below, Petitioners' questions 1 and 3 are not raised by the facts of this case. The issue involved in Petitioners' question 2 may be more accurately stated in the context of this case as follows:

> —Where picketing is enmeshed in a pattern of violence and destruction so as to pose a threat to public order and domestic peace, does the Labor Management Relations Act of 1947, as amended, 29 U. S. C. A. Section 158, et seq. preempt the jurisdiction of a state court to ban the picketing?

STATEMENT OF THE CASE.

Petitioners' statement of the case is inadequate. The case is truly stated by the findings of fact of the trial court (Petitioners' Appendix C at 34a-40a), and the narrative summary of the facts set forth in the controlling Opinion of the Supreme Court of Pennsylvania (Petitioners' Appendix A at 6a-12a).

In short, an order was issued proscribing Petitioners from picketing Respondent's premises and job sites or congregating within 200 yards thereof. The order responded to a systematic campaign of terror by which Petitioners sought to gain absolute control of all work opportunities in commercial construction in Southeastern Pennsylvania. The campaign was characterized by savage beatings of workmen, arson, bombings, and threats of death, directed at Respondent and others. Petitioners have historically used, with apparent immunity from criminal prosecution, a para-military pattern of initial violent assault. When a court order merely limiting the number of pickets has been obtained, Petitioners have initiated a second stage. In this stage, pickets have acted as spotters, directing roving gangs in further destruction and violence. Invariably, these violations of court orders have resulted in no legal consequence, and the Petitioners' campaign has been successful.

What the Pennsylvania courts in this case decided, upon clear proof that Respondent had been the victim of the first stage of Petitioners' campaign, was to enter an order which would preclude Petitioners from carrying out the second stage.

ARGUMENT.

1. No Constitutional Issue Is Presented.

Petitioners seek a writ of certiorari on the assertion that this case relates to the permissible limitations which may be imposed upon *peaceful* picketing (Petitioners' Questions 1 and 3). No such issue is raised by the facts of this case. The trial court found that violence is the norm for Petitioners and that they never intended to peacefully picket the Respondent. Specifically, the trial court found, *inter alia:*

> —The events of June 5th, 1972, were the culmination of a pattern of violence which the [Petitioners] have adopted as a technique for obtaining their goals. Violence and destruction in recent months have become inseparable from the picketing activities of the [Petitioners]. (Findings of Fact No. 27, Petitioners' Appendix C at 38a)
>
> —[Petitioners] have demonstrated their inability or unwillingness to comply with court orders which only enjoin violence and which permit limited picketing. (Finding of Fact No. 39, Petitioners' Appendix C at 39a)
>
> --If the [Petitioners] are permitted to resume picketing in the forseeable future, it is inevitable that violence will reoccur. (Finding of Fact No. 37, Petitioners' Appendix C at 39a)

These findings were made on the basis of competent, substantial, and totally uncontradicted evidence. Two days of hearings were held, at which the Respondent produced 36 witnesses and numerous exhibits. No witnesses appeared for Petitioners, and there was no denial of the

facts by any of Petitioners. In fact, representatives of the Petitioners who were subpoenaed by the Respondent refused to answer all questions, claiming their rights under the Fifth (not the First) Amendment to the Constitution (Petitioners' Appendix A at 10a).

Accordingly, Petitioners' Questions 1 and 3 are purely hypothetical in the context of this case. Unquestionably, the decisions of the trial court and the controlling opinion of the Supreme Court of Pennsylvania are grounded on this Court's decision in *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941). There, as here, an extreme pattern of violence, including bombings, beatings and destruction enmeshed with picketing resulted in a total ban on picketing by an Illinois state court on the ground that peaceful picketing was impossible. *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 371 Ill. 377, 21 N. E. 2d 308 (1939).

Petitioners here seek explicit reversal of *Meadowmoor* on the ground that the decisions of this Court in *Youngdahl v. Rainfair*, 355 U. S. 131 (1957), and *Carroll v. Commissioners*, 393 U. S. 175 (1968), have so limited *Meadowmoor* as to make its rationale inapplicable in any case. The contention is a peculiar one indeed, since *Meadowmoor* is expressly cited with approval in both decisions, clearly preserving its vitality for those infrequent situations where a pattern of violence is created as by Petitioners here.

By any view, the cases relied on by Petitioners are inapposite in this instance.

In *Youngdahl*, 37 employees, nearly all of whom were female, went on strike and picketed their employer to obtain recognition of a union. Their primary offenses were verbal, including name calling, and the chanting of such songs as "When The Scabs Go Marching In" (to the tune of "When The Saints Go Marching In"). Their physical activity con-

sisted of thrusting out their tongues and holding their noses as insulting gestures to employees who crossed the picket line.

A permanent injunction banning all picketing in that case was set aside by this Court, on the stated ground that there had been no pattern of violence of *Meadowmoor* proportions.

Compare 37 singing, face-making employees, picketing their own place of work, to Petitioner's year long orgy of violence and destruction, culminating in the premeditated unleashing of a mob of 1,000 men (none of whom were employed by the Respondent or its subcontractors) with the specific assignment of leveling an entire construction site (Findings of Fact, Petitioners' Appendix C at 34a-40a).

Carroll v. Commissioners, supra, involved a white supremacist group known as the National States Rights Party ("NSRP"). The group held a public rally in Somerset County, Maryland on a summer evening. During the rally, a series of extreme racist speeches were broadcast over a public address system to a crowd of 150 persons, including about 40 blacks. There was also an announcement of a second rally the following night. No violence occurred.

The following day, county officials obtained a 10 day restraining order, barring NSRP rallies or meetings in the county. That order was granted *ex parte,* without notice to, or attempt to notify, the defendants, formally or informally.

The narrow holding of this Court was that an injunction touching in the sensitive area of the First Amendment should not issue *ex parte,* unless reasonable efforts have been made to give the defendants an opportunity to participate. That issue is not raised here. Every effort was made to give the Petitioners notice of Respondent's intention to seek injunctive relief. As stated by the Supreme Court of Pennsylvania:

> "Altemose's counsel indicated at the June 5 hearing that his efforts to serve notice on defendants of plaintiff's intentions to present its petition for a preliminary injunction had proved unavailing. Telephone messages left at the office of the Council's attorney received no response, and Local 30 was sent a telegram between 1:00 P. M. and 1:30 P. M. because it had no phone listing. The hearing commenced at approximately 4:00 P. M." (Footnote 4, Petitioners' Appendix A, at 8a)

The initial preliminary injunction issued on the basis of affidavit and testimony. The order presently under challenge issued only after a full hearing held within five days of the issuance of the initial order, with all parties represented by counsel. Evident from the record of that hearing is that, unlike *Carroll,* this case involved no prior restraint. Extreme systematic violence had occurred by the time the challenged order issued. Petitioners had blazed a year long trail of blood and fire before the Respondent sought and obtained the injunction. There was nothing *prior* or theoretical about the need for relief.

Although it forms no part of the holding, this Court commented in *Carroll* that orders touching upon First Amendment rights should be no broader than necessary to meet the essential needs of public order. In the light of that comment, but with awareness of the trial court finding that Petitioners had violated orders which only limited rather than banning picketing, the Pennsylvania Supreme Court concluded that the one mile buffer zone was unnecessarily large, and reduced the protective barrier to 200 yards (Petitioners' Appendix A at 21a).*

* Petitioners' brief does not disclose that Petitioners have recently filed in the Court of Common Pleas of Montgomery County a motion to further modify or dissolve the preliminary injunction. This motion will come on for hearing in due course.

2. Preemption Does Not Apply.

The preemption issue raised by Petitioners' Question 2 and Respondent's restatement of it is one about which this Court has been absolutely and uniformly clear. The preemption doctrine does not affect strongly held local interests. Thus, in *Amalgamated Motor Coach Employees v. Lockridge,* 403 U. S. 274 (1971), this Court noted with reference to *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959):

> "Garmon itself recognized that Russell permitted state courts 'to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by violence and imminent threats to public order'." (403 U. S. 274, footnote 7)

The findings and conclusions of the Chancellor on this subject clearly place the subject matter outside the preempted zone:

> —The local police were present during the raid but were unable to curb the mob and no arrests were made. Although fire trucks were dispatched to the scene promptly and might have limited the destruction caused by the arson, they were turned back by local police because of concern for the safety of firemen. The fire trucks were delayed for almost two hours until a large contingent of state police was able to reach the scene and part the mob. (Finding of Fact No. 21, Petitioners' Appendix C at 37a)
>
> —The defendant's conduct poses an imminent and continuing threat to the maintenance of domestic peace and public order in this community and in this Commonwealth. (Conclusion of Law No. 9, Petitioners' Appendix C at 45a)

3. The Order Is Clear.

Finally, Petitioners would have this Court believe that confusion and uncertainty exists as to the proper application of the present injunction. It is not unusual for those who dislike what they know to be the clear meaning of an injunction to resort to absurd construction. The union asserted a similar confusion in the *Meadowmoor* case. This Court disposed of that contention as follows:

> "Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one was fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement so that encroachments were made on free discussion outside the limits of violence, as for instance, discussions through newspapers or on the radio, the doors of this Court are always open." (312 U. S. at 298)

Fortunately, the circumstances which warrant the application of *Meadowmoor* are rare. Unfortunately, they occur regularly whenever Petitioners are involved. The holding of *Meadowmoor* is clearly alive and well. In *Carroll* this Court, citing *Meadowmoor* with approval, said:

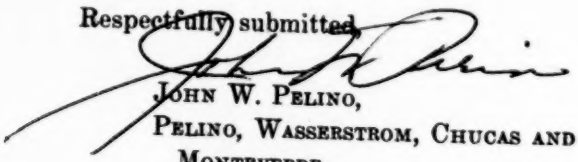
> "We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment." (393 U. S. at 180)

Petitioners seek to bring before this Court a well settled issue, in the hope that they may obtain some pronouncement that sustained violence under the guise of picketing may never be dealt with by the Courts.

CONCLUSION.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,



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